Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES

JOHN AND VERNICE DAILY,
Petitioner,
vs.
STATE OF OKLAHOMA, ex rel. OKLAHOMA DEPARTMENT OF HUMAN SERVICES; HOWARD HENDRICK, Director of Oklahoma Department of Human Services; OKLAHOMA HEALTH CARE AUTHORITY; MIKE FOGARTY, Director of Oklahoma Health Care Authority; and HOWARD HENDRICK, Individually,
Respondent.

On Petition for Certiorari to the Court of Civil Appeals of the State of Oklahoma, Division No. 3

PETITION FOR A WRIT OF CERTIORARI

Katresa J. Riffel*
Jessica L. Caruthers
MITCHEL, GASTON, RIFFEL & RIFFEL, PLLC
3517 West Owen K. Garriott Road, Suite One
Enid, Oklahoma 73728
(580) 234-8447

**Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the corpus of a trust payable to Mrs. Vernice Daily was an "available resource" for Mr. John Daily, her spouse, in a determination of his eligibility for Medicaid benefits?

(2) Whether issue preclusion applies to final determinations of administrative agencies in subsequent litigation?

List of Parties

(1) JOHN DAILY, Plaintiff and Petitioner;

(2) VERNICE DAILY, Plaintiff and Petitioner;

(3) STATE OF OKLAHOMA, ex rel. OKLAHOMA DEPARTMENT OF HUMAN SERVICES, Defendant and Respondent;

(4) HOWARD HENDRICK, Director of the Oklahoma Department of Human Services and Individually, Defendant and Respondent;

(5) OKLAHOMA HEALTH CARE AUTHORITY, Defendant and Respondent;

(6) MIKE FOGARTY, Director of Oklahoma Health Care Authority, Defendant and Respondent.

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OPINIONS BELOW

The order of the Oklahoma Supreme Court denying a Petition for Writ of Certiorari, filed December 14, 2009, is reprinted in the Appendix hereto, pp. A-1.

The opinion of the Court of Civil Appeals of the State of Oklahoma, Division 3, filed September 4, 2009, and reversing the Order of the District Court of Dewey County, State of Oklahoma, is reported at Daily v. State of Oklahoma, et. al., 2009 OK CIV APP 107, 2009 Okla. Civ. App. LEXIS 104. The opinion is reprinted in the Appendix hereto, pp. A-2.

The order of the District Court of Dewey County, State of Oklahoma, granting Petitioners' Motion for Partial Summary Judgment and finding Mr. Daily eligible for Medicaid, filed March 11, 2009, is reprinted in the Appendix hereto, pp. A-15.

The opinion of Howard Hendrick, Director of the Oklahoma Department of Human Services, upon reviewing the decision from the administrative hearing, denying Medicaid eligibility to Mr. Daily, and dated October 21, 2008, is reprinted in the Appendix hereto, pp. A-19.

The Decision of the Administrative Hearing Officer, denying Medicaid eligibility to Mr. Daily, and dated October 1, 2008, is reprinted in the Appendix hereto, pp. A-30.

The Notice to Client Regarding Long-Term Medical Care, denying Medicaid eligibility to Mr. Daily, and dated March 20, 2007, is reprinted in the Appendix hereto, pp. A-34.

JURISDICTION

On November 24, 2008, Petitioners brought suit against Respondents in the District Court of Dewey County, State of Oklahoma, alleging violation of administrative procedures, violations of the federal Medicaid Act, violations of state Medicaid policy, seeking money damages and an injunction. Petitioners previously exhausted their administrative remedies with the Oklahoma Department of Human Services, which denied Mr. Daily's Medicaid eligibility. The Dewey County District Court granted Petitioners' Motion for Partial Summary Judgment, finding Mr. Daily eligible for Medicaid. See App., pp. A-15.

Respondents appealed the ruling. On September 4, 2009, the Court of Civil Appeals, State of Oklahoma, Division Three, issued an opinion reversing the decision of the Dewey County District Court and finding the decision of the Oklahoma Department of Human Services denying Mr. Daily's Medicaid eligibility to be still in effect. See App., pp. A-2.

On December 14, 2009, the Oklahoma Supreme Court denied the Petition for Writ of Certiorari filed by Petitioners. See App., pp. A-1.

The jurisdiction of this Court to review the Order of the Court of Appeals is invoked under 42 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

42 U.S.C. §1396p(d)(3)(B)(i)

§ 1396p. Liens, adjustments and recoveries, and transfers of assets

(d) Treatment of trust amounts.

(3) (B) In the case of an irrevocable trust—

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and

OAC 317:35-5-41(d)(9)(E)(iii)(II), renumbered as 317:35-5-41.6(5)(C)(ii)

317:35-5-41.6 Trust accounts

(5) The rules found in (A) - (C) of this paragraph apply to trust accounts established after August 10, 1993.

(C) There are two types of trusts, revocable trusts and irrevocable trusts.

(ii) In the case of an irrevocable trust, if there are any circumstances under which payments from the trust could be made to or for the benefit of

the individual, the portion of the principal of the trust, or the income on the principal, from which payment to the individual could be made is considered available resources. Payments from the principal or income of the trust is considered income of the individual. Payments for any other purpose are considered a transfer of assets by the individual and are subject to the 60 months look back period. Any portion of the trust from which, or any income on the principal from which no payment could under any circumstances be made to the individual is considered as of the date of establishment of the trust (or if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of the asset transfer rules and are subject to the 60 months look back period.

42 U.S.C. §1396r-5(b)(1) and 42 U.S.C. §1396r-5(b)(2)(B)(ii)(I)

§ 1396r-5. Treatment of income and resources for certain institutionalized spouses

(b) Rules for treatment of income.

(1) Separate treatment of income. During any month in which an institutionalized spouse is in the institution, except as provided in paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) Attribution of income. In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d), except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property. Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides –

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(B) Trust property. In the case of a trust—

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this title [42 USCS §§ 1396 et seq.] (including sections 1902(a)(17) and 1917(d) [42 USCS §§ 1396a(a)(17) and 1396p(d)]), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust—

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the

community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

Okla. Stat. tit. 56, §168

Appeal by applicant--Procedure—Review

A. Any applicant or recipient adversely affected by a decision of the Department of Human Services on benefits or services provided pursuant to the provisions of this title, shall be afforded an opportunity for a hearing pursuant to the provisions of subsection B of this section after such applicant or recipient has been notified of the adverse decision of the Department.

B. 1. Upon timely receipt of a request for a hearing as specified in the notice of adverse decision, the Department shall hold a hearing pursuant to the provisions of Section 310 of Title 75 of the Oklahoma Statutes.

2. The record of the hearing shall include but shall not be limited to:

a. all pleadings, motions, and intermediate rulings,

b. evidence received or considered,

c. any decision, opinion, or report by the officer presiding at the hearing, and

d. all staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

3. Oral proceedings shall be electronically recorded by the Department. Any party may request a copy of the tape recording of their administrative hearing or may request a transcription of the tape recording to comply with any federal or state law.

4. The decision issued pursuant to this subsection shall be the final decision of the Department unless appealed pursuant to subsection C of this section.

C. Any decision of the Department after such a hearing pursuant to subsection B of this section shall be subject to review by the Director of Human Services upon a timely request for review by the applicant, recipient or Department staff. The Director shall issue a decision after review or may refer review of the hearing decision to the Commission for Human Services. The referral shall be based on criteria established by the Commission. The Director's decision shall be final unless appealed as provided by the provisions of subsection D of this section.

D. Any applicant or recipient under this title aggrieved by a decision of the Director rendered pursuant to this section may petition the district court in which the applicant or recipient resides for a judicial review of the decision pursuant to the provisions of Sections 318 through 323 of Title 75 of the Oklahoma Statutes. A copy of the petition shall be served by mail upon the General Counsel of the Department.

OAC 317: 35:19-21(3)(B)(ii), and OAC 35:19-21(1)(B)

Determining financial eligibility for care in NF

Financial eligibility and vendor payment calculations for individuals in an NF are determined according to whether or not a spouse remains in the home.(1) For an individual without a spouse, the following rules are used to determine financial eligibility.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

John and Vernice Daily, Petitioners, are husband and wife. Mr. Daily lives in the Leedey Nursing Center, Leedey, Oklahoma. He is the "institutionalized spouse." Mrs. Daily lives at home. She is the "community spouse." At issue in this case is the Vernice Daily Irrevocable Trust Dated February 15, 2007 ("the Trust") and whether assets owned by the Trust are "available" in determining Mr. Daily's Medicaid eligibility pursuant to federal and state law. Federal and Oklahoma Medicaid law only consider available resources in determining Medicaid eligibility. Unavailable resources are not considered.

Mrs. Daily has a community spouse resource allowance of $62,870. Mr. Daily is allowed $2,000. In other words, so long as Mr. and Mrs. Daily own available assets totaling no more than $64,870, Mr. Daily is entitled to Medicaid benefits. At the time of Mr. Daily's application for Medicaid, the couple owned less than $62,870 of available resources and Mrs. Daily owned the Trust, which contained $51,000.

If the Trust is considered an available resource for Medicaid purposes, Petitioners owned available resources exceeding their combined resource allowance and Mr. Daily is thus not entitled to Medicaid benefits. If the Trust is not considered an available resource, Petitioners' available resources were valued at less than their allowance, and Mr. Daily should be Medicaid eligible. This is the only issue as to Medicaid eligibility before this Court.

The Oklahoma Department of Human Services ("OKDHS") has already litigated the issue of the trust corpus being an available resource. In In re: Arvel

Hayes, Case No. M731902, hearing no. H49751 (2006), the OKDHS appeals committee determined that a trust identical to Mrs. Daily's was not an available resource in determining Medicaid eligibility. See App., pp. A-39. OKDHS based its decision therein on 42 U.S.C. §1396p(d)(3)(B)(i) and Oklahoma Administrative Code (OAC) 317:35-5-41(d)(9)(E)(iii)(II) (presently renumbered as OAC 317:35-541.6(5)(C)(ii)). OKDHS agreed the Hayes decision would be applied to other applications with the same trust and has, in fact, applied the Hayes decision to many other Medicaid eligibility determinations.

B. The Administrative Proceedings

OKDHS denied Mr. Daily's Medicaid application March 20, 2007, stating that the assets in the Trust were available resources in determining Mr. Daily's eligibility, citing OAC 317:35-541(d)(9)(E)(iii)(II), OAC 35:19-21(3)(B)(ii), and OAC 35:19-21(1)(B). See App., pp. A-34. Mr. Daily requested a fair hearing, and Ms. Gail L. Wettstein conducted the administrative hearing September 12, 2008. Although OKDHS has agreed that the only issue was whether the trust corpus was an available resource, Ms. Wettstein held in favor of OKDHS, finding that Mr. Daily incurred a transfer penalty in creating the Trust. See App., pp. A-30. This basis for denial was never presented, briefed, or argued by either party to the action.

Mr. Daily requested Director Review of OKDHS' administrative hearing decision. On October 21, 2008, Howard Hendrick, director of the Oklahoma Department of Human Services, issued an opinion affirming that Mr. Daily was not eligible for Medicaid. See App., pp. A-19.

C. The District Court Proceedings

Petitioners sought judicial review of OKDHS' decision with the Dewey County, Oklahoma District Court on November 24, 2008. Petitioners filed a Motion for Partial Summary Judgment, which was granted by the Honorable Ray Dean Linder January 29, 2009. See App., pp. A-15.

D. The Appellate Court Proceedings

The Respondents herein filed a Petition in Error with the Oklahoma Supreme Court, seeking review of the District Court Order, on April 10, 2009. The Oklahoma Supreme Court assigned the case to the Oklahoma Court of Civil Appeals, Division Three, and on September 4, 2009, the Court of Civil Appeals issued an opinion reversing the Order of the District Court. The Court of Appeals held that the corpus of Mrs. Daily's Trust, to the extent payable to Mr. Daily, is a resource available, and to the extent any portion is not payable to Mrs. Daily, it is a disposed asset for less than fair market value and subjects Mr. Daily to a transfer penalty. See App., pp. A-2.

The Oklahoma Supreme Court issued an Order December 14, 2009 refusing to issue a Writ of Certiorari to the Court of Civil Appeals. See App., pp. A-1.

At every stage of the proceedings, the eligibility of Mr. Daily has been at issue. Mr. Daily has continually and openly relied on the applicable federal and Oklahoma Medicaid laws. OKDHS and the Court of Civil Appeals have ignored and misapplied federal law.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

REVIEW IS WARRANTED BECAUSE THE OPINION OF THE OKLAHOMA COURT OF APPEALS AS TO THE AVAILABILITY OF THE TRUST CORPUS IS CONTRARY TO FEDERAL MEDICAID LAW.

The Oklahoma Court of Civil Appeals determined that the corpus of Mrs. Daily's Trust was an asset available to Mr. Daily in a determination of his Medicaid eligibility. There are no controlling, published decisions in Oklahoma or the Tenth Circuit on this issue. The U.S. Supreme Court has not decided this important federal law question. Other state courts have ruled differently than the Court of Civil Appeals, finding that the income of a community spouse is not available to the institutionalized spouse.

The only case cited by the Court of Civil Appeals concerning availability of the trust corpus is a Third Circuit case, Johnson v. Guhl, 357 F.3d 403, 409 (3d Cir. 2004). In Johnson, the Court held an annuity trust, designed to provide a lifetime stream of annuity payments to the community spouse, was a countable asset because the payments could be used for the benefit of the institutionalized spouse. Johnson, however, is not controlling law in Oklahoma because this Court has not affirmed it. Unless a decision of a federal court has been affirmed by the United States Supreme Court, it is not binding on state courts as precedent. Turpen v. Oklahoma Corporation Commission, 769 P.2d 1309, 1315 (Okla. 1988).

Also, in the Hayes decision, the OKDHS appeals committee determined that Johnson was "in sharp conflict with the plain language of long standing federal statutory law and regulations." Gail Wettstein, the Administrative Law Judge issuing the Hayes opinion, cited the case of Estate of F.K., 863 A.2d 1065 (N.J. Super. 2005), in her criticism of and refusal to follow Johnson. Furthermore, as Estate of F.K. and the Hayes decision point out, the Johnson court failed to support the Johnson decision with any analysis or authority, and further failed to acknowledge the departure from established law.

As the Court of Civil Appeals notes in its opinion, states that choose to participate in the Medicaid program must operate in compliance with federal statutes and regulations. Pharmcare Oklahoma, Inc. v. State Health Care Authority, 152 P.3d 267, 269-70 (Okla. Civ. App. 2007). However, OKDHS did not follow federal law in finding the trust corpus to be available to Mr. Daily. Specifically, 42 U.S.C. §1396r-5(b)(1) provides that no income of the community spouse shall be deemed available to the institutionalized spouse. Further, 42 U.S.C. §1396r-5(b)(2)(B)(ii)(I) provides that if income from a trust is paid solely to the community spouse, the income shall be considered available only to the community spouse.

Several other courts have determined the issue of income to the community spouse as not available to the institutionalized spouse. In James v. Richman, 465 F.Supp.2d 395 (M.D. Pa. 2006), the court held neither the community spouse's annuity nor the income stream from the annuity were countable assets in determining the institutionalized spouse's Medicaid eligibility. Similarly, the Pennsylvania Supreme Court held that income from a community spouse's annuity was not available for purposes of determining

Medicaid benefits for an institutionalized spouse, in Ross v. Department of Public Welfare, 936 A.2d 552, 554 (Pa. 2007) ("to consider the market value of an income stream as an available resource would completely undermine federal law...").

The Court of Appeals exercised flawed reasoning and failed to analyze the statutory and regulatory scheme for Medicaid eligibility in reaching its decision. As a result, the determination by the Court of Civil Appeals is directly at odds with federal law. A Writ of Certiorari should issue to correct this critical conflict with federal law.

II.

REVIEW IS WARRANTED BECAUSE THE OPINION OF THE OKLAHOMA COURT OF APPEALS IGNORES THE APPLICATION OF ISSUE PRECLUSION TO ADMINISTRATIVE DECISIONS.

The doctrine of issue preclusion applies in this case. Although asserted by the Petitioners in their Motion for Partial Summary Judgment filed in the District Court of Dewey County, State of Oklahoma, the Court of Civil Appeals essentially ignored this argument, other than to briefly state "the agency's decision is not precluded by its hearing officer's contrary decision in another applicant's case" (See App., pp. A-13, ¶18). The Opinion contains no explanation or citations in this regard. This determination is not in accord with previous decisions of the Oklahoma Supreme Court.

Issue preclusion operates to enjoin successive attempts to relitigate the same issue in different forums. The Oklahoma Supreme Court has articulated, in Feightner v. Bank of Oklahoma, that

the preclusion doctrine applies "to final administrative decisions if appropriate and not subject to some recognized exception." 65 P.3d 624, 629 (Okla. 2003). In fact, "...application of preclusion principles to final agency adjudicatory decisions is favored ..." Id. (emphasis added).

According to Feightner, issue preclusion requires, at a minimum, that (1) a party against whom it is being asserted was either a party to or a privy of a party to the prior action; (2) the issue subject to preclusion has actually been adjudicated in the prior case and was necessary or essential to the outcome; and (3) a party against whom it is being asserted had a full and fair opportunity to litigate the claim or critical issue. Id. at 629.

For issue preclusion to operate as a bar to subsequent proceedings, there must be a final judgment or order deciding the issue. State of Oklahoma ex rel. Department of Transportation v. Little, et. al., 100 P.3d 707, 720 (Okla. 2004). An administrative decision that is not appealed administratively or subjected to final judicial review becomes final. A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses no further power to reconsider or rehear the claim. Id.

Specifically, an OKDHS administrative decision becomes a final decision unless it is appealed by the Medicaid applicant, Medicaid recipient, or OKDHS staff. OKLA. STAT. tit. 56, §168(B)(4). The decision in In re: Arvel Hayes, Case No. M731902, Hearing No. H49751 (2006), in which OKDHS determined the trust corpus was not an available asset, was issued February 21, 2006. The decision was never appealed by either party, and thus, became a final decision.

OKDHS was a party in the Hayes action and had a full and fair opportunity to litigate the issues in Hayes. The issue subject to preclusion – the available of the trust corpus – was essential to the outcome. The Hayes Trust and the Daily Trust are identical, other than names and specific asset values. Thus, the facts, law, and issues are the same. Accordingly, issue preclusion applies to the case at bar, and the ruling in Hayes governs. As such, the trust corpus is not an available asset to Mr. Daily, and he is Medicaid eligible.

CONCLUSION

Petitioners, John and Vernice Daily, submit that the Oklahoma Court of Civil Appeals decided a question of substance regarding an issue not previously decided by this Court when it determined that the corpus of a trust payable to Mrs. Daily was an available resource for Mr. Daily in a determination of his eligibility for Medicaid benefits. The Court of Civil Appeals also decided a question of substance regarding the applicability of issue preclusion in a way not in accord with previous decisions of this Court.

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted.

Dated: March 10, 2010.

Respectfully submitted,

Katresa J. Riffel
Jessica L. Caruthers
Mitchel, Gaston, Riffel & Riffel, PLLC

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

MONDAY, DECEMBER 14, 2009

SUPREME COURT
STATE OF
OKLAHOMA

DEC 14 2009

Michael S. Richie
Clerk

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

106,968 John Daily and Vernice Daily v. State of Oklahoma, ex rel. Oklahoma Department of Human Services, et al.

Petition for certiorari is denied.

ALL JUSTICES CONCUR

/s/ James E. Edmondson
CHIEF JUSTICE

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION
BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

Filed
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

SEP – 4 2009
Michael S. Richie
Clerk

JOHN AND VERNICE DAILY,	)	
	)	
Plaintiffs/Appellees,	)	
vs.	)	Case No.
	)	106,968
STATE OF OKLAHOMA ex rel., OKLAHOMA, DEPARTMENT OF HUMAN SERVICES; HOWARD HENDRICK, Director of Oklahoma Department of Human Services; OKLAHOMA HEALTH CARE AUTHORITY; MIKE FOGARTY Director of Oklahoma Health Care Authority; and HOWARD HENDRICK, Individually,	)	
	)	
Defendant/Appellants.	)	

APPEAL FROM THE DISTRICT COURT OF
DEWEY COUNTY, OKLAHOMA
HONORABLE RAY DEAN UNDER, TRIAL JUDGE

REVERSED

Craig Riffel, Dalen D. McVay, MITCHEL, GASTON, RIFFEL & RIFFEL, Enid, Oklahoma,	For Plaintiff/Appellees,
Lynn S. Rambo Jones, Oklahoma City, Oklahoma	For Defendant/Appellant, Oklahoma Health Care Authority
Travis Smith, Oklahoma City, Oklahoma	For Defendant/Appellant, Oklahoma Department of Human Services.

OPINION BY CAROL M. HANSEN, PRESIDING JUDGE:

¶1 Defendant/Appellants, State of Oklahoma ex rel. Oklahoma Department of Human Services (DHS), Howard Hendrick, director of DHS, Oklahoma Health Care Authority (OHCA), and Mike Fogarty, director of OHCA (collectively State), seek review of the district court's order granting summary judgment in favor of Plaintiff/Appellees, John Daily (Husband) and Vernice Daily (Wife) (collectively Applicants), in their action for judicial review of

DHS's decision denying Husband's application for Medicaid benefits based upon Husband's transfer of his assets to a trust payable to Wife. We hold the corpus of the trust, to the extent it is payable to Wife, is a resource available to Husband. To the extent any portion of the corpus is not payable to Wife, it is a disposed asset that subjects Husband to a transfer penalty,

We reverse the district court's order, leaving DHS's decision in effect.

¶2 Husband entered a nursing home in Kansas on November 28, 2006 and transferred to an Oklahoma nursing home on January 30, 2007. Wife continued to live at home. At the time Husband first entered a nursing home, Applicants owned countable resources totaling $121,740.00, of which half, or $60,870.00, was allocated to each spouse. In February 2008, Wife created an irrevocable trust. Husband funded the trust with $51,000.00 and spent down his remaining resources to $2,000.00 by paying for living expenses and his nursing home care.

¶3 The trust agreement stated the purpose of the trust was "to enable [Husband] to qualify for Medicaid assistance." It stated Wife was "the sole beneficiary of this trust" and provided the trustee would pay to Wife "all of the net income and principal of the trust in 48 monthly installments," beginning March 5, 2007. The trust agreement provided that if 'Wife died before the term of the trust expired, the remaining trust property would be paid as provided in her will or to her living descendants per stirpes.'

¶4 Husband then applied to DHS for Medicaid benefits. DHS denied the application based upon Husband's possession of resources in excess of the $2,000.00 Medicaid resource limit. Husband sought an administrative hearing. After a hearing, the DHS hearing officer found Husband was ineligible for Medicaid based upon 42 U.S.C. §13 96p(c)(1),[1]

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[1] 42 U.S.C. §1396p provides in part,

(c) Taking into account certain transfers of assets

(1)(A) In order to meet the requirements of this subsection for purposes of section 1396a(a)(18) of this title, the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

(B)(i) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d) of this section or in the case of any other disposal of assets made on or after February 8, 2006, 60 months) before the date specified in clause (ii).

(ii) The date specified in this clause, with respect to-

(I) an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan,...

because he had transferred assets for the purpose of qualifying for Medicaid and did not receive fair market value for the assets.

¶5 Applicants appealed the hearing officer's decision to Hendrick, the director of DHS. Hendrick concluded:

> Mrs. Daily was entitled to receive half of the $121,739.23 the couple had when Mr. Daily entered the nursing home on November 28, 2006. Mrs. Daily kept her half, $60,896.50. Mr. Daily put $51,000 in the Trust, which solely benefited Mrs. Daily - leaving Mrs. Daily with $111,896.50. Since she was only entitled to have $60,896.50, the extra $51,000 must be attributed to Mr. Daily. Since Mr. Daily has not shown that $49,000 has been spent for his benefit to bring his resources down to the $2,000 Medicaid cap, OKDHS acted correctly in denying his application.

E)(i) With respect to an institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall be equal to -

(I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application

¶6 Pursuant to 75 O.S.2001 §322, Applicants sought judicial review of the agency's final decision in the district court of Dewey County. They moved for summary judgment, first arguing DHS is barred by issue preclusion from denying Husband benefits. They asserted DHS's final administrative decision in *In re: Arvel Hayes*, Case No. M73 1902, Hearing No. H4975 1 (2006), holding the wife's trust was not an available resource in determining the husband's Medicaid eligibility, precluded DHS from determining Wife's trust in the present case is an available resource. They also argued the trust corpus was not an available resource under 42 U.S.C. § 1396p(d)(3)(B)(I)[2]

---

[2] 42 U.S.C. §1396p(d)(3)(B) provides,

> (B) In the case of an irrevocable trust--
>
> (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income-
>
> (I) to or for the benefit of the individual, shall be considered income of the individual, and
>
> (II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and
>
> (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by

and OAC 317:35-5-41.6(5)(c)(II)[3] because Wife's trust was irrevocable, she was the sole beneficiary, and Husband was never entitled to receive any property from the trust. They argued, therefore, there were no circumstances under which payments could be made to the trust to Husband or for his benefit.

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including the amount of any payments made from such portion of the trust after such date.

[3] ~OAC 317: 35-5-41 .6(5)(C)(ii) provides,

> In the case of an irrevocable trust, if there are any circumstances under which payments from the trust could be made to or for the benefit of the individual, the portion of the principal of the trust, or the income on the principal, from which payment to the individual could be made is considered available resources. Payments from the principal or income of the trust is considered income of the individual. Payments for any other purpose are considered a transfer of assets by the individual and are subject to the 60 months look back period. Any portion of the trust from which, or any income on the principal from which no payment could under any circumstances be made to the individual is considered as of the date of establishment of the trust (or if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of the asset transfer rules and are subject to the 60 months look back period.

¶7 In response, State argued 42 U.S.C. §1396r-5(c)(2)[4] required it to attribute the $51,000.00 in the trust to Husband. Any resources belonging to the couple in excess of Wife's allocation of $60,870.00 must be attributed to Husband and counts against the $2,000.00 resource limit. State argued in the alternative that funding the trust was a disqualifying transfer which would subject Applicants to a penalty period before they could be eligible for Medicaid. In addition, State argued issue preclusion was inapplicable because this case did not involve the same parties as the Hayes case.

¶8 After oral argument, the district court granted summary judgment in favor of Applicants, finding

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[4] 42 U.S.C. §1396r-5(c)(2) provides,

> Attribution of resources at time of initial eligibility determination
>
> In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property--
>
> (A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and
>
> (B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

The provisions of this section are implemented in Oklahoma by OAC 317:35-19-21

the trust was unavailable for Medicaid purposes. State appeals without appellate briefs in conformance with the procedures for the appellate accelerated docket, Okla.Sup.Ct.R. 1.36, 12 O.S.Supp.2003, Ch. 15, App. 1. However, State moved for an order to treat this matter as an ordinary appeal from a final order of the district court rather than a Rule 1.36 accelerated procedure. The Oklahoma Supreme Court denied the motion without prejudice to the reviewing court permitting briefs to be filed. We decline to permit further briefing.

¶9 Medicaid is a cooperative program of the state and federal governments to provide medical assistance for the poor. A state is not obliged to participate in a Medicaid program, but if it does participate, it must operate its program in compliance with federal statutes and regulations. *Pharmcare Oklahoma, Inc. v. State Health Care Authority*, 2007 OK CIV APP 5, 152 P.3d 267, 269-270. OHCA is the designated state agency for the administration of the Oklahoma Medicaid Program. It contracts with DHS for the determination of Medicaid eligibility and other administrative or operational functions related to the Oklahoma Medicaid Program. 63 O.S.Supp.2004 §5009(B)(1).

¶10 DHS's determination as to Medicaid eligibility is subject to judicial review pursuant to the Oklahoma Administrative Procedures Act, 75 O.S.2001 §318 et seq. The material facts in the present case are undisputed; therefore we will review the agency decision and district court order only for error of law pursuant to 75 O.S.2001 §322(1)(d).

¶11 In *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002), the U.S. Supreme Court acknowledged,

"Because spouses typically possess assets and income jointly and bear financial responsibility for each other, Medicaid eligibility determinations for married applicants have resisted simple solutions." In 1988, Congress enacted a complex set of instructions in 42 U.S.C. §1396r-5 to permit a spouse living at home, called the "community spouse," to reserve certain income and assets to meet the minimum monthly maintenance needs the community spouse will have when the other spouse, the "institutionalized spouse," is institutionalized in a nursing home and becomes eligible for Medicaid. Id.

¶12 The portion of the couple's assets reserved to the community spouse is called the "community spouse resource allowance" (CRSA), and consists of one-half the value of the nonexempt assets, subject to a minimum and maximum. §1396r-5(f)(2)(A). The CRSA is computed as of the beginning of institutionalization. § 1396r-5(c)(1).

¶13 At the time of the applicant's initial eligibility determination, all resources held by either spouse are considered available to the institutionalized spouse. §1396r-5(c)(2)(A). An applicant's countable resources are the total nonexempt resources less the CRSA. OAC 317:35-19-21 (3)(B)(vi). The institutionalized spouse is not eligible for Medicaid

unless the countable resources do not exceed the maximum resource standard as determined by DHS. OAC 317:35-19-21 (3)(B)(vii). Excess resources must be spent down to the maximum resource standard before the institutionalized spouse is eligible for Medicaid.

¶14 Congress has addressed the treatment of trusts for Medicaid eligibility purposes. An individual is considered to have established a trust if either the individual or the individual's spouse established the trust other than by will. 42 U.S.C. §1396p(d)(2)(A)(i) and (ii). If the trust is an irrevocable trust and there are any circumstances under which payment from the trust may be made to or for the benefit of the individual, the portion of the corpus from which that payment may be made is considered resources available to the individual. §1396p(d)(3)(B)(i). Any portion of the corpus from which no payment could be made to the individual must be considered assets disposed by the individual. § 1396p(d)(3)(B)(ii).

¶15 Disposing of assets renders an individual ineligible for Medicaid for a period of time equivalent to the amount of nursing home care those assets would have purchased. § 1396p(c)(1)(A) and (E)(i). However, an individual is not ineligible for Medicaid "to the extent that ... the assets ... were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse." § 1396p(c)(2)(B)(i). A transfer of assets to a spouse does not render an individual subject to the transfer penalty because pursuant to § 1396r-5(c)(2)(A) those assets remain available to the transferring individual.

¶16 In the case of assets transferred to a trust, the assets remain available to the transferring individual to the extent they may be paid to the spouse, because payments to the spouse benefit the transferring individual. For example, in Johnson v. Guhi, 357 F.3d 403,409 (3d Cir. 2004), the Court held an annuity trust, designed to provide a lifetime stream of annuity payments to the community spouse, was a countable asset because the payments could be used for the benefit of the institutionalized spouse. This is particularly true in Oklahoma, where one spouse has the duty of supporting the other spouse. 43 O.S.2001 §202. To the extent assets transferred to a trust are not payable to the spouse, they must be treated as assets disposed by the transferring individual.

¶17 In the present case, Husband transferred his assets to a trust for the purpose of qualifying for Medicaid. The entire corpus of the trust is payable to Wife over the course of four years; therefore, it is considered a resource available to Husband. To the extent any portion of the corpus is not payable to Wife and to the benefit of Husband, it must be treated as a disposed asset that subjects Husband to a transfer penalty. Accordingly, we hold DHS properly decided Husband was ineligible for Medicaid.

¶18 The agency's decision is not precluded by its hearing officer's contrary decision in another applicant's case.

19 The district court erred in reversing DHS 's decision. Its order granting summary judgment in favor of Applicants is REVERSED, and DHS's decision remains in effect

MITCHELL, C.J., and JOPLIN, J., concur.

IN THE DISTRICT COURT OF DEWEY COUNTY
STATE OF OKLAHOMA

DEWEY COUNTY, OKLAHOMA
FILED
MAR 11, 2009
NANCY LOUTHAN, Ct. Clerk
By: _____
Deputy

JOHN AND VERNICE DAILY,	)	
	)	
Plaintiffs,	)	
vs.	)	Case No.
	)	CJ-2008-85
	)	
STATE OF OKLAHOMA, ex rel., OKLAHOMA DEPARTMENT OF HUMAN SERVICE, HOWARD HENDRICK, Director of Oklahoma Department of Human Services; OKLAHOMA HEALTH CARE AUTHORITY, MIKE FOGARTY, Director of Oklahoma Health Care Authority; HOWARD HENDRICK, individually,	)	
Defendants.	)	

ORDER

Now on this 29th day of January, 2009, this case comes on for hearing on the Plaintiff's Motion for Partial Summary Judgment against the Defendants State of Oklahoma ex rel, Oklahoma Department of Human Services and Howard Hendrick, Director of Oklahoma Department of Human Services (OKDHS), Oklahoma Health Care Authority and Mike Fogarty, Director of Oklahoma Health Care Authority and Defendants Response to Plaintiff's Motion for Partial Summary Judgment. Plaintiff appears by and through counsel, Craig Riffel of Mitchel, Gaston, Riffel & Riffel, PLLC and Defendant Oklahoma Department of Human Services appear by and through counsel Travis Smith. The Oklahoma Health Care Authority appears by and through counsel, Lynn Rambo Jones. The Court having reviewed the record and hearing arguments of counsel finds as follows:

1. The Vernice Daily Irrevocable Trust is unavailable for Medicaid purposes;

2. Defendants have until five days following filing of this Order memorializing the Court's judgment to carry out the judgment.

3. Plaintiffs' Motion for Summary Judgment is SUSTAINED.

IT IS SO ORDERED.

/s/ Ray Dean Linder
HONORABLE RAY DEAN LINDER
District Court Judge

APPROVED AS TO FORM AND CONTENT:

/s/ Craig Riffel
Craig Riffel, OBA#16373
Dalen D. McVay, OBA#20777
Mitchel, Gaston, Riffel & Riffel, PLLC
P.O. Box 887
Woodward, OK 73802
Telephone: (580) 254-3447
Facsimile: (580) 254-5314
Attorneys for Plaintiff

/s/ Travis Smith
Travis Smith, OBA#8418
Assistant General Counsel
Oklahoma Department of Human Services
P.O. Box 53025
Oklahoma City, Oklahoma 73152-3025
Telephone: (405) 521-3638
Facsimile: (405) 521-6816
Attorneys for Defendant OKDHS and Director Hendrick

_/s/ Travis Smith with permission of
Lynn Rambo-Jones
Oklahoma Health Care Authority
P.O. Drawer 18497
Oklahoma City, OK 73154-0497
Telephone: (405) 522-7431
Facsimile: (405) 530-3455

OKLAHOMA DEPARTMENT OF HUMAN SERVICES
Sequoyah Memorial Office Building
P.O. Box 25352
Oklahoma City, OK 73125-0352
(405) 521-3646 • www.okdhs.org

October 21, 2008

Craig Riffel
Mitchel, Gaston, Riffel & Riffel, PLLC
P.O. Box 5557
Enid, OK 73702

re: John Daily
Case Number H103586
Hearing Number H-51432

Dear Mr. Riffel:

As Director of the Oklahoma Department of Human Services (ODHS), one of my responsibilities is the review of the administrative hearing decisions issued by this agency. These reviews are performed at the request of clients and concern their eligibility for benefits from certain OKDHS programs. In the case of John Daily, the issue is whether OKDHS acted correctly in denying his Medicaid application.

THE FACTS

Mr. Daily entered a nursing home in Kansas on November 28, 2006 and transferred to an Oklahoma

nursing home on January 30, 2007. On November 28, 2006, Mr. and Mrs. Daily owned countable resources totaling $121,740.

On February 26, 2007, Mrs. Daily created a Trust. Mr. Daily funded it with $51,000 of the resources allocated to him, leaving him with resources totaling $9,870. The remaining resources were spent down to $2,000.00 by paying the couple's living expenses and for his nursing home care.

The Trust pays out to Mrs. Daily in 48 equal monthly payments, a period shorter than Mrs. Daily's expected life. The Trust was irrevocable and Mrs. Daily could not sell, pledge, assign or encumber her right to receive payments. If Mrs. Daily died before the last payment was made, the remainder would be distributed as directed by her will, or in the absence of such a provision, to her descendants *per stirpes*.

On March 5, 2007, Mr. Daily asked for an assessment of resources and income by OKDHS. OKDHS allocated half of the couple's $121,740 resources to each of the spouses. This left Mr. Daily with $60,870 in countable resources.

OKDHS subsequently informed Mr. Daily that his Medicaid application was denied because:

> OAC 317:35-5-41(d)(9)(E)(iii)(II) says, "In the case of an irrevocable trust, if there are any circumstances under which payments from the trust could be made to or for the benefit of the individual, the portion of the principal of the trust, or the income on the

> principal, from which payment to the individual could be made shall be considered a resource available to her."
>
> The couple therefore has countable resources totaling $121,739.23 and Ms. Daily's share of the couple's resources is $60,869.62.
>
> According to OAC 317:35-19-21(3)(B)(ii), any resources not allocated to Ms. Daily are allocated to Mr. Daily. Therefore, Mr. Daily has resources of $60,869.62, which exceeds the $2,000.00 Medicaid resource limit.

A Request for a Fair Hearing was filed on March 19, 2007.

On October 5, 2007, Mr. Daily was certified to be eligible for Medicaid pursuant to an order in *Zelle v. OKDHS*, Woodward County case number CJ-2008-8.

On February 7, 2008, Mr. Daily was notified that he case was closed because of an Order issued by the Oklahoma Supreme Court in *Oklahoma Health Care Authority v. Linder*, No. 105,259. The Oklahoma Supreme Court's Order vacated all of the District Court's prior actions in *Zelle v. OKDHS*. The reason given for closure was the same as that on the original denial.

A second Request for a Fair Hearing was filed for Mr. Daily on February 8, 2008 and a hearing held on September 12, 2008. At the hearing, and in pre and post-hearing briefs, you asserted:

- A 2006 decision by the OKDHS Appeals Committee in *Arvel Hayes,* case number M731902 and hearing number H-49751; precludes OKDHS from treating the Trust as an available resource;
- OKDHS subsequently followed the *Hayes* analysis in five other companion cases, which
precludes OKDHS from treating the Trust as an available resource;
- The Trust corpus was not an available resource; and
- The transfer of resources into the Trust by Mr. Daily did not subject him to a penalty for transfer without receipt of fair market value (FMV) in return.

At the hearing, and in pre and post-hearing briefs, OKDHS and the Oklahoma Health care Authority (OHCA) asserted:

- The Hayes hearing decision was superseded by a 2007 case with a trust identical to Mrs. Daily's in every legally significant respect;
- OKDHS did not follow the *Hayes* decision in five subsequent cases. Prior to hearing in *Hayes*, the parties agreed to be bound by *Hayes* in the five similar cases that were pending. Therefore, the six cases were certified as a result of one Appeals Committee decision;
- The Trust corpus was a resource available to Mr. Daily because his transfer to the trust was a transfer to

Mrs. Daily in excess of her Community Spouse Resource Allowance;

- OKDHS asserted that Mr. Daily was not subject to a transfer penalty for funding the Trust. The OHCA asserted that Mr. Daily was subject to a transfer penalty.

The OKDHS Appeals Committee issued its decision on October 1, 2008:

- The Appeals Committee found that issue preclusion does not apply when an agency has made an erroneous interpretation of law and provides a rational analysis for its change of position;
- OHCA, a necessary party, did not participate in the *Hayes* case;
- OKDHS had not previously considered the penalty provisions of the Deficit Reduction Act of 2006;
- The burden is on Mr. Daily to show he is eligible for Medicaid and that his transfer of resources was for a purpose other than to qualify for benefits; and
- Mr. Daily did not attempt to prove that his transfer of resources was for purposes other than to establish Medicaid eligibility, and is therefore subject to a penalty for transfer of resources without receipt of FMV in return.

It is from this decision that Mr. Daily appeals.

THE LAW

Long-Term Care and Spousal Impoverishment

One of the categories of care provided by Medicaid is Long-Term Care (LTC), which is for people who live in an institution, such as a nursing home. OAC 317:35-9-1. When the person living in the nursing home has a spouse who lives at home, then nursing home spouse is called the 'institutionalized spouse' and the spouse at home is called the 'community spouse.' 42 U.S.C. § 1396r-5(h).

What the rest of the world knows as an 'asset,' Medicaid calls a 'resource.'[5] 42 U.S.CA §1396p(e)(5). Medicaid defines 'asset' to include both income and resources. 42 U.S.C. § 1396p(3)(1).

One of the requirements for LTC eligibility is that the institutionalized spouse have countable resources of $2,000 or less, 42 U.S.C. §§ 1396a(a)(17)(B), 1382(a)(1)(B); OAC 317:35-19-20(2); OKDHS Appendix C-1, Schedule VI.

When an institutionalized spouse applies for

---

[5] 42 U.S.C. § 1396p(h)(5) defines 'resources' as, ". . .the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section. However, 42 U.S.C. §1382b does not define what a resource is. 20 C.F.R. §416.120(a), contains the relevant definition, ". . . resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance."

Medicaid to pay for nursing home care, the couple's resources are apportioned between them according to the 'spousal impoverishment' provisions of the Medicare Catastrophic Coverage Act (MCCA), enacted in 1988. A certain amount of the couple's total resources is attributed to the community spouse and the rest is attributed to the institutionalized spouse.

In 2006, the year Mr. Daily entered the nursing home, the Community Spouse Resource Allowance (CSRA)[6] minimum was $25,000 and the maximum was $99,540.

Since the resource limit for a nursing home resident seeking Medicaid eligibility is $2,000, the institutionalized spouse is eligible for Medicaid only if the couple's total resources, after deducting the CSRA, are $2,000 or less. If the resources allocated to the institutionalized spouse are greater than $2,000, then she is ineligible for Medicaid until her resources have been spent down to $2,000. 42 U.S.C. § 1396a(a)(17)(B), OAC 317:35-19-21(B)(viii). The amount that has to be spent to bring her resources down to $2,000 is referred to as the "spenddown."

Trusts

42 U.S.C. § 1396p(d)(3)(B)(I) says that if a community spouse establishes an irrevocable trust and funds it with resources belonging to either spouse:

---

[6] The CSRA is called the 'spousal share' in the OAC.

> if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual . . .

Disposing of Resources for less than Fair Market Value

OAC 317:35-19-20(4), in effect on the date the Trust was created, says:

> An institutionalized individual, an institutionalized individual's spouse, the guardian or legal representative of the individual or individual's spouse who disposes of resources on or after August 11, 1993 for less than fair market value on or after the look-back date specified in (A) of this paragraph subjects the individual to a penalty period for the disposal of such resources.

The penalty period is determined by dividing, in whole months, the total uncompensated value of the asset by $2,000. 42 U.S.C. §1 396p(c)(1)(E). 'Uncompensated value' is defined as ". . .the difference between the fair market value at the time of transfer less encumbrances and the amount received for the resource." OAC 317:35-19-20(4)(D).

However, there is no penalty if an institutionalized spouse transfers resources to the community spouse, or to another for the sole benefit of the community spouse. 42 U.S.C. §1396p(c)(2)(B)(i), OAC 317:35-17-10(3)(F)(iii). This transfer is limited, however, to an amount necessary to bring the community spouse's resources up to the CSRA. 42 U.S.C. § 1396p(f)(1), OAC 317:35-17-10(3)(F)(iii).

ANALYSIS

Issue Preclusion

In *Hayes*, "The parties agreed that the Trust is irrevocable and that the sole issue remaining for decision was whether the Trust, when analyzed as an irrevocable trust, is an available resource to Mr. Hayes." There is no mention in the decision that OKDHS asserted that Mr. Hayes' funding of the Trust was a transfer to her in excess of her CSRA. The decision also says, "You and counsel for OKDHS also stated that you represent five other clients with trusts virtually identical to this Trust and that the parties had agreed that those cases would be decided in accord with the conclusions of law made in this decision.

For reasons not shown in the record herein, OKDHS staff did not ask that I review the *Hayes* Appeals Committee decision. In the first case that came before me in which a trust like Mrs. Daily's was presented, I corrected the *Hayes* Appeals Committee decision and found that the when a trust benefiting a community spouse is funded, the amount funded must be counted toward the CSRA.

Hayes does not preclude OKDHS from denying Mr. Daily's application because it was incorrectly decided, was not reviewed by me, and the legal analysis has been superseded by my decision of June 27, 2007.

The Merits

Mrs. Daily was entitled to receive half of the $121,739.23 the couple had when Mr. Daily entered the nursing home on November 28, 2006. Mrs. Daily kept her half, $60,896.50. Mr. Daily put $51,000 in the Trust, which solely benefited Mrs. Daily – leaving Mrs. Daily with $111,896.50. Since she was only entitled to have $60,896.50, the extra $51,000 must be attributed to Mr. Daily. Since Mr. Daily has not shown that $49,000 has been spent for his benefit to bring his resources down to the $2,000 Medicaid cap, OKDHS acted correctly in denying his application.

CONCLUSION

Mr. and Mrs. Daily are free to establish a trust that solely benefits her and fund it with his half of their resources. However, this transaction cannot be used to circumvent the CSRA and give Mrs. Daily $111,896.50 of the couple's $121,739.23 in countable resources. OKDHS therefore acted correctly in denying Mr. Daily's Medicaid application. Mr. Daily will not be eligible for Medicaid until he makes a new application and shows that $49,000 of the couple's resources have been spent on him in ways that do not create different financial ineligibility issues.

If Mr. Daily disagrees with my decision, 56 O.S. § 168 gives him the right to pursue judicial review by filing a petition in the district court for the county in which he lives within thirty days of the date on this decision.

Very truly yours,

/s/ Howard H. Hendrick
Howard H. Hendrick, Director
Department of Human Services

c: S.O. Files
Appeals
Dewey County Director
Lynn Rambo-Jones
Susan Hohmann

ADMINISTRATIVE HEARING
BEFORE THE OKLAHOMA DEPARTMENT
OF HUMAN SERVICES

IN RE: JOHN Daily) Case No. H10386
Applicant.) Hearing No. H-51432

DECISION

This matter came on for hearing the 12th day of September, 2008. Craig Riffel appeared for the Applicant; Lynn Rambo Jones appeared for the Oklahoma Health Care Authority, a necessary party, and Susan Hohmann appeared for the Oklahoma Department of Human Services.

The following questions are presented in this appeal: 1) whether Mr. Daily is eligible for Medicaid for nursing home care and, 2) whether this court is bound by a previous decision.

Application of the Deficit Reduction Act of 2005

The Deficit Reduction Act of 2005 amends section 1917(C)(1)(B)(i) of the Social Security Act by providing a sixty (60) month look back period for any transfer of assets made on or after February 8, 2006. The trust at issue in the case herein was created by Mrs. Daily on February 26, 2007. Therefore, it is subject to the sixty (60) month look-back period.

Oklahoma Health Care Authority: A Necessary Party

The undersigned hearing officer is not aware of any previous Medicaid eligibility case in which the

Oklahoma Health Care Authority (OHCA) appeared as a party. On January 7, 2006, the Oklahoma Supreme Court ruled in *Oklahoma Health Care Authority v. the Honorable Ray Dean Linder* (No. 105,259) that OHCA is the designated state agency for the administration of the Oklahoma Medicaid Program in charge of funding, and is a necessary party in such cases.

Eligibility of Mr. Daily for Medicaid for Nursing Home Care

The trust at issue plainly states it is created in order for Mr. Daily to qualify for Medicaid. (Article III, Trust Purpose). There is no evidence before the tribunal to suggest Mr. Daily's assets were transferred for fair compensation, for market value, or for other valuable consideration. See *Rainey v. Mackey*, 773 So.2d 118 (Fla.App.2000); *Thompson v. Dep't. of Children and Families*, 835 SO.2d 357 (Fla.App.2003).

Mr. Daily does not meet his burden, set forth at 42 U.S.C. §1396p(c)(2)(C)(ii), to show his assets were transferred for a reason or purpose other than to become Medicaid eligible. Therefore, the sixty month period of ineligibility imposed by the Deficit Reduction Act of 2005 applies to him, and bars his eligibility at the present time for Medicaid for nursing home care.

Issue Preclusion, Res Judicata, Collateral Estoppel and Stare Decisis

Res judicata does not apply where an administrative agency makes an erroneous interpretation of law, or

where there is a manifest error in the record of the prior administrative proceeding. *Neserve v. Statem*, 119 N.H. 149, 400 A.2d 34 (1979); *Harrah v. Richardson*, 446 F.2d 1 (4th Cir. 1971).

Likewise, res judicata does not apply to claims or issues which were not raised before the administrative agency. *Mckee v. Ramsey County*, 310 Minn. 192, 245 N.W.2d 460 (1976); *Power Rates & Area Development, Inc.*, 257 N.C. 560, 126 S.E. 2d 325 (1962).

When an agency departs from its prior practice or rule, it must supply reasoned analysis indicating that prior policies and standards are being deliberately changed and not casually ignored. *Springer v. District of Columbia Department of Employment Services*, 743 A.2d 1213 (D.C. 1999). When the agency provides rational analysis for its change of position, the reviewing court should affirm the agency's decision. *Watergate East, Inc. v. Public Service Com'n of District of Columbia*, 665 A.2d 843 (D.C. 1995). See *CJS Public Administrative Law and Procedure* §§291 and 292.

Clear Departure in Policy

This decision signals a clear departure in the determination of eligibility for Medicaid for nursing home care. The reason for the departure from principles announced in prior cases is that the sixty-month look-back period mandated by the Deficit Reduction Act of 2005 was not considered by the Oklahoma Department of Human Services when examining trusts to determine whether they were an

available asset for Medicaid eligibility determination purposes.

Furthermore, all previous decisions regarding Medicaid eligibility were decided without the participation of the Oklahoma Health Care Authority, which is now understood to be a necessary party to this litigation.

This decision is final unless Mr. Daily asks the Director of the Department of Human Services to review the decision. If he wants the Director to review this decision, the written request for review must be received by OKDHS within thirty days of the date of this decision. The thirty days to appeal begins on the day after the date at the top of this letter, **not** on the day you receive this letter. The request for review should say why you disagree with this decision.

Witness my hand this 1st day of October, 2008.

/s/ Gail Wettstein cg
Gail L. Wettstein
Administrative Hearing Officer

c: Dewey County 22C (Linda Semmel, County Director)
SO/Legal Division/Travis Smith
SO/FSSD/Jim Struby
OHCA/Lynn Rambo-Jones
Wettstein File
Appeals
File

STATE OF OKLAHOMA
DEPARTMENT OF HUMAN SERVICES

NOTICE TO CLIENT REGARDING
LONG-TERM MEDICAL CARE

Case name	Case number	Client Identification (ID) number
JOHN CHARLES DAILY	**H103586**	

c/o Darrel Daily
Box 236
Taloga, OK 73667

RECEIVED
MAR 20 2007
APPEALS UNIT

Based on information currently available, the following action is being taken regarding your eligibility for long-term care under the Medicaid Program. Only the items checked below apply to your situation.

1. ☐ Payment has been approved for you beginning _____ for care in:
   - ☐ nursing facility
   - ☐ intermediate care facility for mentally retarded

   You are responsible for paying the nursing facility operator $_____ per month.

2. ☐ Effective _____ you are to pay the nursing facility operator $_____ per month, which is a different amount than you have been paying.

3. ☐ Payment for: ☐ personal care ☐ Advantage waiver

☐ Home and Community Based Waiver (HCBW) services

has been approved for you beginning _____.

4. ☒ Payment for: ☒ nursing services ☐personal care

☐ Home and Community Based Waiver (HCBW) services

is denied because: OAC 317:35-5-41(d)(9)(E)(iii)(II) says, "In the case of an irrevocable trust, if there are any circumstances under which payments from the trust could be made to or for the benefit of the individual, the portion of the principal of the trust, or the income on the principal, from which payment to the individual could be made shall be considered available resources. . ." Since the Vernice Daily Irrevocable Trust will pay all of its principal and income to Ms. Daily, all of the principal is considered a resource available to her.

5. The couple therefore has countable resources totaling $121739.23 and Ms. Daily's share of the couple's resources is $60869.62.

6. According to OAC 356:19-21(3)(B)(ll), and resources not allocated to Ms. Daily are allocated to Mr. Daily. Therefore Mr. Daily has resources of $60869.62, which exceeds the $2,000 Medicaid resource limit. Refer to OAC 317:35-19-21(1)(B).

7.

8. □ Effective ____, payment for □ nursing services
□ personal care □ Advantage waiver
□ Home and Community Based Waiver (HCBW) services cannot be made because:

ABCDM-37-C NOTICE TO CLIENT REGARDING LONG-TERM MEDICAL CARE

A copy of this letter is being sent to LEEDEY NURSING CENTER for use in billing.

/s/Gerry G. Moore	03 15 07	Dewey
Signature	Date	County

☐ **Advanced notice required:** Services may be continued at the present level if you request a hearing on the action within ten days of the date of the signature above. The services will be continued until a decision is made on your hearing. You may request a hearing no later than 30 days from the date of the signature above.

☒ **Advance notice not required:** You may request a hearing no later than 30 days following the date of the signature above.

If you do not consider this decision a proper one, you or your authorized representative may request a hearing at the local Oklahoma Department of Human Services (OKDHS) office to appeal the decision. You have the right to legal counsel at the hearing. You may choose your own private attorney, or information about where you can get free legal help is available on request from the local OKDHS office. Forms for requesting a fair hearing, assistance needed in completing the forms, or

preparing for a hearing are available from the local OKDHS office or your lawyer.

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OKDHS REVISED 00-00-00

OKLAHOMA DEPARTMENT OF HUMAN SERVICES

Charles Lee Waters, General Counsel
Office of General Counsel
P.O. Box 53025
Oklahoma City, OK 731562-3025
(405) 521-3638 – FAX (405) 521-6816

February 21, 2006

Craig Riffel
Mitchel, Gaston, Riffel & Riffel
P.O. Box 5557
Enid, OK 73702

re: Arvel Hayes
Case No. M731902
Hearing no. H-49751

Dear Mr. Riffel:

The issue in the above-styled case is whether the Nettie M. Hayes Irrevocable trust dated March 22, 2005 (the trust) is considered a countable resource when determining the Medicaid eligibility of Mr. Hayes. The OKDHS Appeals Committee finds that it does not.

THE FACTS

Mr. Hayes entered the Golden Oaks nursing facility on October 20, 2004.

On March 22, 2005 Mr. Hayes' wife, Nettie, created the Nettie M. Hayes Irrevocable Trust dated March 22, 2005 (the Trust) and placed $35,000 in it. The Trust is irrevocable, unassignable, may not be amended, and pays out completely to Mrs. Hayes in equal payments over a two-year period. If Mrs. Hayes dies before the two years is up, Eric and Erin Weida will receive the remaining payments. Liberty Federal Savings Bank of Enid, Okalhoma is Trustee. At the time the Trust was established, Mr. Hayes' life expectancy was 7.23 years. None of the beneficiaries will consent to amendment of the Trust.

On April 13, 2005 Mr. Hayes filed a request for assessment of resources and income with OKDHS. On April 18, 2005, he filed an application for Medicaid benefits.

On May 23, 2005 OKDHS issued a notice which denied Medicaid eligibility because of excess resources. This was superceded by a Notice to client of Action Taken, dated June 24, 2005. ON June 17, 2005 Mr. Hayes filed a Request for a Fair Hearing.

Following the filing of Mr. Hayes' request for a Fair Hearing, OKDHS informed you that Mr. Hayes' application was denied because OKDHS considered the Trust to be an available resource.

Hearing

By stipulation, the parties agreed that OKDHS reviewed eight trusts created and funded prior to February 1, 2005 and which have terms substantially identical to those of the Hayes' Trust, and that OKDHS reviewed the trusts in light of OAC 317:35-5-41(d)(9)(E)(iii)(II). When reviewing the trusts, OKDHS treated them as irrevocable and unassignable. The OKDHS Legal Division issued written opinions stating that neither the trust principal nor income were countable resources for either spouse, and that payments were income to the community spouse only.

Lynn Retz, a lawyer employed by your firm, testified regarding her efforts to market the Trust. Ms. Retz testified that she attempted to contact all ten of the companies that OKDHS claimed would buy irrevocable and unassignable annuities, or the income streams from such annuities. Three companies could not be located and one failed to respond. Four companies refused to review the Trust. Two companies reviewed the Trust and declined to purchase.

Counsel for OKDHS did not object to Ms. Retz being a witness and, following her testimony, stated that OKDHS accepted her testimony as truthful. Counsel for OKDHS also stated that if the OKDHS Appeals Committee analyzed the Trust as an annuity, Mr. Hayes had rebutted the presumption of marketability found at OAC 317:35-5-41(d)(10)(A)(ii). Counsel also stated that OKDHS no longer asserted that the Hayes' Trust was an annuity.

The parties agreed that the Trust is irrevocable and that the sole issue remaining for decision was whether the Trust, when analyzed as an irrevocable trust, is an available resource to Mr. Hayes. You and counsel for OKDHS also stated that you represent five other clients with trusts virtually identical to this Trust and that the parties had agreed that those cases would be decided in accord with the conclusions of law made in this decision.

THE LAW

42 U.S.C. §1396p(d)(3)(B)(I) says, in regard to irrevocable trusts:

> if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual . . .

OAC 317:35-5-41(d)(9)(E)(iii)(II) says:

> In the case of an irrevocable trust, if there are any circumstances under which payments from the trust could be made to or for the benefit of the individual, the portion of the principal of the trust, or the income on the principal, from which payment to the individual could be made shall be considered available resources . . .

Paragraph 3259.6(D) of the State Medicaid Manual says:

> Payments are considered to be made to the individual when any amount from the trust . . . is paid directly to the individual or to someone acting on his/her behalf, e.g., a guardian or legal representative. Payments made for the benefit of the individual are payments of any sort, including an amount . . . paid to another person or entity such that the individual derives some benefit from the payment. For example, such payments could include purchase of clothing or other items, such as a radio or television for the individual. Also such payments could include payment for services the individual may require, or care, whether medical or personal that the individual may need.

Neither the statute or the regulation have been amended at any time relevant to this decision.

ANALYSIS

OKDHS' assertion that the Trust constitutes an available resource to Mr. Hayes rests squarely on the decision in *Johnson v. Guhl*, 357 F.3d 403 (3rd Cir. 2004). In *Johnson*, the court held that a trust, identical to this Trust, was an available resource because, after receiving the monthly payments, the community spouse could use the payment for the benefit of the institutionalized spouse. In analyzing the OKDHS position, two questions must be answered: 1) is *Johnson* controlling? and if not 2) should OKDHS nevertheless follow its holding when determined Medicaid eligibility?

Binding Precedent

The Oklahoma Supreme court has addressed the first question squarely and has held: 1) unless the decision of a federal court has been affirmed by the United States Supreme court, it is not binding on state courts as precedent. *Turpen v. Okalhoma Corporation Com'n*, 1988 OK 126, 769 P.2d 1309, 1315 (OK. 1988); and 2) the decision of a lower federal court in determining the meaning of a federal statute is highly persuasive rather than controlling. *Bruce v. Everton*, 68 Pl.2d 95, 97; 180 Okl. 111 (1937).

The United States Supreme Court has not affirmed *Johnson v. Guhl* and therefore, it must be considered to be highly persuasive, but not controlling. The undersigned administrative law judge finds no legal basis to hold a state agency to a different standard than a state court when considering the precedential weight of a federal court decision.

Should *Johnson* be Followed?

The reasoning of the Third Circuit in *Johnson* does not withstand scrutiny. The New Jersey Supreme Court explained this best in *Estate of F.K.*, 374 N.J. Super. 126,863 A.2d 1065 (2005), saying:

> The observation [that the state may choose to treat commercial annuities as countable assets} is dictum unaccompanied by an analysis of the statutory and regulatory scheme and any consideration of the opinions that form our

> record on appeal by the person charged with administration and oversight of the Medicaid scheme.

Id., at 1074.

The Third Circuit's decision is simply in sharp conflict with the plain language of long standing federal statutory law and regulations. The failure to support the decision with any analysis or authority, or recognition of the departure from established law is obvious or manifest error. A brief summary of established law ignored by the Third Circuit highlights the manifest nature of the error.

When the plain language of 42 U.S.C. § 1396p(d)(3)(B)(I) and OAC 317:35-5-41(d)(9)(E)(iii)(II) are applied to the facts of this case, it is apparent that the payments to Mrs. Hayes are not 'to or for the benefit of' Mr. Hayes and therefore, the corpus of the Trust is not available to him.

CONCLUSION

The OKDHS Appeals Committee finds that: (1) the Trust is a trust and not an annuity, (2) pursuant to 42 U.S.C. §1396p(d)(3)(B)(I) and OAC 317:35-5-41(d)(9)(E)(iii)(II), the Trust is not an available resource in determining Medicaid eligibility, and (3) OKDHS acted incorrectly in treating the Trust as an available resource. Since the parties agreed that if the Trust is unavailable to Mr. Hayes and he meets all the factors of Medicaid eligibility. The OKDHS Appeals Committee finds that he Mr. Hayes became eligible for Medicaid on march 22, 2005, the date the Trust was created and funded.

by agreement of the parties, the finding of the OKDHS Appeals Committee in this case regarding the availability of the Trust shall be binding in the following cases:

Garfield County, Case No. M731771, Hearing No. H-49750
Sequoyah County, Case No. C875742, Hearing No. H-49701
Kay County, Case No. M732282, Hearing No. H-49793
Major County, Case No. M188974, Hearing No. H-49603
Woodward County, Case No. M732118, Hearing No. H-49817

/s/ Gail L. Wettstein
Gail L. Wettstein
Administrative Law Judge

c: Garfield Co. 24-C, 20-07
Jim Struby, SO/FSSD
Appeals File
File